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SUBJECT: CONSTITUTION REVIEW COMMITTEE FACES HUGE TASK

¶1. Summary: The Constitution of Kenya Review Act of 2008, as part of the reform agenda outlined in the political power-sharing agreement, provided for a Committee of Experts (the Committee) to review the Kenyan Constitution and existing drafts from previous constitutional review efforts. Following a public consultation process and a report to Parliament which is intended to identify contentious issues, the Committee is expected to present a "harmonized draft" to the Parliamentary Select Committee and then to Parliament for approval. After Parliamentary approval, the draft is to be submitted to a national referendum. Sworn in on March 2, the nine-member Committee of six Kenyans and three foreign experts has until December 22, 2009 to complete its ambitious task. Initial reports from committee members indicate frustration with lack of financial and other resources, as well as concern and confusion about how best to achieve their legally mandated goals and responsibilities. Delays in selecting a chairman to head the Interim Electoral Commission (septel), which is tasked with conducting the constitutional referendum, have also contributed to uncertainty about the review process.
End summary.

BIG MANDATE, SHORT TIME FRAME

¶2. On March 2, the nine members of the Committee of Experts on constitutional review were sworn in. The Committee was created by the Constitution of Kenya Review Act of 2008, with the following four-part mandate: to review existing prior draft constitutions and other relevant documents (including the version rejected by voters in the unsuccessful 2005 constitutional referendum and other drafts prepared by the defunct Constitution of Kenya Review Commission in 2004); to prepare a report to Parliament on issues that are agreed and those that remain contentious; to consult with the public on those contentious issues; and, to draft a harmonized proposed Constitution for approval by Parliament. If approved by Parliament the draft would then be submitted for public approval by national referendum. Both the Parliamentary approval and the referendum require a two-thirds majority to adopt the draft as Kenya's new constitution. The Review Act requires that the Committee's draft will specify which issues are already agreed, and those issues will not be submitted to the referendum. Constitutional experts note that some 80 percent of the content will likely not be controversial (as was the case in the 2005 effort to pass a new constitution), so the public will be voting on the remaining 20 percent of the issues that remain divisive.

¶3. The Committee held its first meeting on March 4. Because the clock on their 12-month mandate began running from the date President Kibaki signed the Review Act, they have just over nine months (until December 22, 2009) to complete their task. (Note: The only way for this deadline to be extended would be a Parliamentary amendment of the Review Act. However, the Committee members have so

far stated that they do not want such an extension. End note.) The Kenyan members are Chairman Nzamba Kitonga, Deputy Chairman Atsango Chesoni, Njoki Ndung'u, Otiende Amolo, Abdirashid Hussein, and Bobby Mkangi. The foreign members, all drawn from other Commonwealth countries, are Christina Murray of South Africa, Chaloka Beyani of Zambia, and Frederick Ssempermbwa of Uganda. Ex-officio members of the Committee are Attorney General Amos Wako and Committee director Ekuru Aukot. While no one in Kenya is devoid of political ties, the committee members are generally viewed as, and have publicly expressed their commitment to be, politically neutral. They are also considered to be competent legal experts with extensive legislative drafting experience. The obvious exception is ex-officio member Wako, a close and long-time ally of President Kibaki.

14. In a March 25 meeting with representatives from a number of major donor countries, Chesoni and Aukot (who serves as the administrative director of the Committee) outlined their progress to date and also described the challenges the Committee faces going forward. To date, they reported, the Committee has developed a matrix analyzing the existing constitution. Next steps include an offsite at which the team will develop their operational plan (which will be a public document). After that, the members will review existing documents, including past competing drafts from the 2004-2005 constitutional review effort (widely known as the Bomas and Wako drafts, respectively), to evaluate which issues are agreed and which are "contentious" (a term not otherwise defined in the Review Act), and to develop an honest draft of a proposed constitution following the public consultation process laid out in the Review Act. (Note: The public participation element in this current effort to write a new constitution is greatly curtailed compared to the very extensive

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consultations undertaken by the former Constitution of Kenya Review Commission from 2002-2004. End note.)

FINANCIAL SHORTFALLS POSE CHALLENGE

15. Aukot expressed concern about lack of financial resources, noting that the Committee's secretariat currently consists of himself and an assistant. Part of the difficulty, according to Aukot, is that the Committee began its work toward the end of Kenya's fiscal year, which starts in July. Chesoni also complained about the rigid requirements for spending the government funds that have been allocated thus far. For example, she said, the Committee has a budget for drivers but not for researchers, and it is not allowed simply to hire researchers instead or to divert money from their hospitality budget for more substantive purposes. She joked that members had discussed taking researchers out for an endless series of lunches and dinners in order to get the work done. Aukot outlined a projected budget need of \$6.5 million, of which the government has funded about \$1.2 million, which prompted skeptical whispers from donors at the meeting. Some donors, including the Dutch and Norwegian governments, have already pledged to supplement the Committee's budget.

AMBIGUOUS DEADLINES

16. Aukot and Chesoni also noted that the Review Act provides for four reviewing bodies: the Committee, the Parliamentary Select Committee (PSC), the Parliament, and the referendum. As Aukot pointed out, the Committee is the only non-political organization involved in the constitutional review process. While there are some firm deadlines in the law, they expressed concern that ambiguities could lead to excessive delays. For example, the Committee has a firm timeline for drafting their report on contentious issues, presenting it to the public for a 30-day comment period, and then to the PSC. However, there are no deadlines for the PSC to respond or for the Parliament to respond if the PSC does not concur with the report. Chesoni worried that this ambiguity in the Review Act could allow the PSC or Parliament to stall forward progress on the referendum, perhaps for long enough

that it would become impossible to conclude before the 2012 elections.

PUBLIC CONSULTATIONS

17. Chesoni noted that there is a very high degree of public skepticism with regard to commissions of this type, especially following the failure of the government-sponsored constitutional referendum in 2005. The 2005 referendum was preceded by some of the most comprehensive public consultations ever undertaken in connection with a constitutional review process. However, many of those participating in these consultations felt that their desires and convictions were largely ignored in the final product. The sense of disappointment was a major contributing factor to the proposed constitution's eventual defeat (in November 2005). Chesoni said that there was a lot of concern within the Committee and in civil society about how the public would get involved this time. She added that the committee members wanted to create a process that would allow for authentic and meaningful citizen participation, without the process being shortchanged or hijacked by any segment of the political elite. However, she and Aukot seemed to lack concrete ideas about how to make that happen. While expressing the desire to start a civic education process as soon as possible, they did not offer any specifics about what that process should look like or how it will be funded.

COMMENT

18. Constitutional reform is arguably the most important (and longest overdue) of the reform commitments made in the political power-sharing agreement signed in February 2008. If done well, a new constitution would address some of the core underlying issues that gave rise to violence in the 1992, 1997, and 2007 elections, including the division of executive power between the president and prime minister, land rights, and the devolution of funds and political power away from the central

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government. While the Committee members want to make a good faith effort to advance this agenda, they are handicapped by some practical and political considerations, including a very short mandate, budget constraints, and the lack of a clear common vision on how to conduct the public consultation process and develop a harmonized draft.

19. As a practical matter, the referendum needs to go forward by the end of 2010 at the very latest, or it will be subsumed in the political struggle as candidates vie to replace Kibaki in 2012. The review process may also be further undermined by other initiatives already planned to begin this year that could be flashpoints for conflict, including a national census and planned redistricting exercise that could substantially redraw the Kenyan political map. We will continue to push the government to support the constitutional review process, both rhetorically and financially. We are indirectly supporting the work of the committee through our ongoing civil society strengthening program, which will help civil society to formulate and present its ideas on the constitutional review process. We have (through USAID) also allocated \$500,000 for FY 09 to the multi-donor supported National Civic Education Program (NCEP), which will assist the Committee in the civic education component of its work. Additional funding from Washington for NCEP would be helpful in this regard. We continue to coordinate closely on this issue with other international donors. We will also engage with the committee members to encourage a prompt and inclusive process.

RANNEBERGER